

Testimony By Mr. Patrick Rogers

Modrall, Sperling, Roehl, Harris &
Sisk, New Mexico

Attorney

Thank you Mr. Chairman and members of the Committee for inviting me to testify today. I appreciate this opportunity to address the Committee about the important issues of voter identification and ensuring that only United States citizens can vote to elect our leaders in the elections of our country.

My name is Patrick J. Rogers, and I am an attorney in private practice in New Mexico with the Modrall, Sperling, Roehl, Harris & Sisk, P.A. law firm. I am also a member of the Board of Directors of the American Center for Voting Rights Legislative Fund ("ACVR-LF"). I have been personally involved in litigation to protect voters' rights in my home state of New Mexico. Through my involvement with ACVR-LF, I have also been involved in litigation and legislation to protect the right of all voters to participate in our election process and to make sure that every legal vote is fairly and honestly counted.

ACVR-LF is a national, non-partisan, non-profit organization that was founded on the belief that public confidence in our electoral system is the cornerstone of our democracy. ACVR-LF supports election reform that protects the right of all citizens to participate in the election process free of intimidation, discrimination or harassment. ACVR-LF's aim is for election reform that will make it easy to vote but tough to cheat. ACVR-LF supports election reforms such as those proposed by the nonpartisan Carter-Baker Commission.

I am here today because I am concerned about fraud in the registration and voting process, and that legal voters have been disenfranchised by ballots illegally and fraudulently cast in our state and federal elections. I was involved in litigation over the conduct of the election in New Mexico in 2000 when Senator Gore was credited with a 366 vote lead, when the county recounts, related suits, and investigations were halted. In 2004, I was involved in a host of lawsuits concerning the election process including voter identification requirements and ballot access issues. Presently, I am counsel to three individuals who seek to intervene in a federal suit in which the American Civil Liberties Union has challenged the constitutionality of the City of Albuquerque's photo identification requirements. ACVR-LF has requested Amicus status, and I represent ACVR-LF in that suit as well. *ACLU v. Santillanes*, Civ. 05-1136 MLA/WDS (D. N.M.).

Fraudulent voting and problems with registration in 2004 brought new attention to these topics in New Mexico, but these problems are not new problems for New Mexico. In 1952, the Senate Subcommittee on

Privileges and Elections of the Committee on Rules and Administration investigated the New Mexico Senate election of November 4, 1952. The Senate Committee Report suggests New Mexico has not made much progress in the ensuing fifty-four years:

An election must authoritatively express the will of the people. This can be accomplished only by an electoral system which clearly identifies those who are qualified to vote, establishes conditions under which the voter can freely express his choice, and creates standards to accurately record the results of the election. Although the system is important, the exercise of the electoral franchise depends not alone upon procedures but equally upon its honest and efficient administration. The investigation into the New Mexico senatorial election of 1952 revealed the deplorable spectacle of the exploitation and breakdown of an electoral system through irresponsible and ineffective administration.

Report of the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 83rd Congress, 2nd Session, General Findings and Conclusions at 1, U.S.G.P.O. Wash. 1954. The report noted that illegal aliens had registered and voted. The subcommittee suggested "the registration system is so loose and ineffective that it is an invitation to fraud and dishonesty in elections. Since the registration laws must be strictly enforced to encourage full participation by the citizens and to readily determine the qualifications of those who present themselves to vote on election day." Id. at 4.

Voting by non-citizens is not just a concern in New Mexico. In the wake of the 1996 election, as this committee is well aware, the contest of the Dornan-Sanchez election identified at least 784 illegally cast votes and this committee's report concluded that the exact number of illegal residents who were registered and cast ballots could not be conclusively determined.

I am not in a position today to quantify or even begin to quantify the magnitude of the problem. However, I am in a position to assure you in the strongest terms possible that fraudulent registration and fraudulent voting is a problem. Attachment 1 is the new voter identification card in the name of Leticia Armijo. Ms. Armijo carries a valid "green" card and she found herself in line to access government services just prior to the 2004 election. She was pressured into signing a voter registration despite her questions and concerns about whether it was lawful for her to do so. She was assured the registration was lawful. It is, of course, unlawful. Although Ms. Armijo has not voted, clearly other non-citizens may not be so concerned about fidelity to this nation's election laws.

Proof of Citizenship to Register to Vote

Voting by illegal immigrants is one of the toughest issues to study in the election and voting area. This is because there is no centralized or accessible list of illegal immigrants that can be compared to voter registration lists or lists of persons who actually cast ballots. The closest "list" I am aware of that could be used as a basis for systematic research is a list maintained by the Bureau of Immigration and Customs Enforcement ("ICE") at the Department of Homeland Security. This is a list of those illegal immigrants who have overstayed their Visas or are "deportable." But the list is not available to election officials to check or validate voter registration rolls.

New Mexico

was truly plagued in 2004 by fraudulent voter registration by some employees of the Association of Community Organizations for Reform ("ACORN") and a few other 527 groups. The Bernalillo County Clerk reported more than three thousand fraudulent registrations after media reports highlighted the registration of a thirteen year old, by an ACORN employee. In the 2004 New Mexico voter identification cases, the ACORN director responsible for the oversight of the registration drive invoked his Fifth Amendment right at the trial. Another 527 witness invoked her Fifth Amendment right to remain silent about the details of the registration process. The Albuquerque Police Department Special Gang Unit arrested a Cuban national for possession of crack cocaine paraphernalia, and the investigation disclosed the fellow was supplementing his income by gathering fraudulent voter registration forms for ACORN. This type of voter registration fraud seriously undermines the public confidence in the election process.

In a pending federal suit in the Federal District Court of New Mexico, ACLU v. Santillanes, Civ. 05-1136 MLA/WDS (D. N.M.), I represent Dwight Adkins who applied to intervene in the suit because in 2004 his vote was stolen. He was not allowed to vote when he appeared at his polling place because someone had voted fraudulently in his place. His "provisional ballot" was cast and denied on the basis, he was told, that he had already voted. Rosemary McGee of Albuquerque suffered the same fate.

While some advocates for illegal immigrants claim that illegals want nothing to do with the government and therefore won't register to vote or attempt to vote, there are other advocates for both legal and illegal immigrants who are actively pushing to legalize non-citizen voting. Whole organizations exist to advocate for "rights" of immigrants to vote include, for example, the Immigrant Voting Project at the New School in New York City.

Last spring, Tufts University funded a study on the "feasibility" of non-citizen voting in Massachusetts. That study opened with this summary: "...There is growing support for non-citizen voting nationwide, and action taken by lobbyists, activists, non-citizens, and other key stakeholders can lay the foundation for a more favorable outcome in the future."

And this sort of advocacy is not confined to academics in Massachusetts. The "UCLA Chicano Studies Research Center" issued a report in December of 2003 entitled "Political Apartheid in California: Consequences of Excluding a Growing Noncitizen Population." The press release announcing the report said the author concluded that "a de facto political apartheid will exist in California if steps are not taken to include more than 4.6 million non-citizen adults in the voting process."

Other legal journals are publishing similar articles, such as "Prospects for Democratic Change: Non-Citizen Suffrage in America" published in the Hamline Journal of Public Law & Policy and "Noncitizen Voting Rights: The History, the Law and Current Prospects for Change" published in the Law and Inequality Journal.

Several of these articles gloss over the issue of who may be in the United States lawfully and who may be in the United States in violation of our laws. In advance of the 2004 elections, the affirmation of U.S citizenship required by the National Voter Registration Act ("Motor Voter") law was at issue in several states. Despite the clear mandate of the Motor Voter law that any potential voter must affirm citizenship on the voter registration application, South Dakota and Iowa issued directives to voter registration officials that voters should be added to the rolls even if their application did not affirmatively indicate they are United States citizens. One case even went to litigation (*Diaz v. Hood*) in Florida because Florida maintained that this citizenship box affirming citizenship needs to be affirmatively "checked" in order for the person to register to vote. And, I should note, this case was essentially re-filed in the last few months in Florida.

In Maryland, the state elections director reportedly told the Associated Press in August of 2004 that he was "shocked" to learn that non-citizens were on the state's voter registration rolls. ICE reportedly did not cooperate with the state's attempt to identify and remove non-citizens from the state's voting rolls. Maryland has at least six municipalities that affirmatively allow non-citizens to vote in local elections.

In 2005, Utah's legislative audit bureau attempted to undertake a systematic study of illegal immigrants who had obtained state identification cards - either driver's license or state identification cards. Utah determined that some 383 possibly illegal immigrants were registered to vote. Utah asked ICE to review these registered voters to determine if, in fact, they were U.S. citizens. ICE examined a sample consisting of 135 of these individuals and determined that 5 were naturalized citizens, 20 were "deportable," one was a permanent legal resident and the other 109 had no record and were likely in the United States illegally. Fourteen of these 383 individuals voted in a recent election in Utah, but ICE did not provide enough information to the state to allow it to determine whether these 14 individuals were in fact citizens.

The State of Arizona is currently embroiled in litigation over Proposition 200. The citizens of Arizona passed by popular initiative a requirement that before someone can register to vote, they must be a citizen of the state and United States. This passed in a landslide and a CNN poll analyzing Proposition 200 found that nearly fifty percent of the Hispanic/Latino community supported Proposition 200. This is not a racial or ethnic issue.

The Federal Election Assistance Commission has issued an opinion claiming that states may not require more than is provided on the federal voter registration application while, at the same time, the Department of Defense is instructing its personnel to provide proof of citizenship as the state of Arizona requests when registering to vote in Arizona using the postcard application. The concept is simple. It is proper and appropriate for a state to request proof of citizenship before a person is added to the voter rolls. This is a simple commonsense measure to protect the right of all honest citizens of whatever partisan or ethnic background to participate in our elections without having their vote cancelled by a ballot cast by someone who is not legally entitled to vote.

In the past few days, the federal court in the pending Arizona lawsuit has denied a request for a temporary restraining order and reaffirmed the critical nature of the right to vote and the need to assure eligibility to vote: "Determining whether an individual is a United States citizen is of paramount importance when determining his or her eligibility to vote. In fact, the NVRA repeatedly mentions that its purpose is to increase registration of 'eligible citizens.' Proving proof of citizenship undoubtedly assists Arizona in assessing the eligibility of applicants. Arizona's proof of citizenship requirement does not conflict with the plain language of the NVRA." *Gonzales v. Arizona*, 06 Civ. 1268 (ROS) (D. Az. June 20, 2006).

A large number of individual cases of illegal immigrants registering to vote or voting have been reported in the news media. Here are just a few examples:

- In Maryland, a 2006 email from a member of the Montgomery County Board of Elections in Montgomery County, Maryland was made public indicating he was going to register people to vote "regardless of status." I've attached a copy of that email to this testimony.

- Donna Hope, a non-citizen immigrant from Barbados who resides in Philadelphia, was told by a representative of the voter registration group "Voting is Power," the voter mobilization arm of the Muslim American Society, that she could register to vote if she has been in the United States at least 7 years. Ms. Hope completed the registration form and was added to the voting rolls. In November of 2004, Ms. Hope did not vote because she was not a citizen, but someone illegally cast a ballot in her name. See Attachments 2-7.

- The Wall Street Journal reported that "[t]he man who in 1994 assassinated Mexican presidential candidate Luis Donaldo Colosino in Tijuana had registered to vote at least twice in the U.S. although he was not a citizen."

- In 1998, California Secretary of State Bill Jones referred to the INS claims by nearly 450 people called for jury duty in Orange County, California who claimed they were exempt from jury duty because they were non-citizens. The jury duty lists are pulled from driver's license and registered voter files.

Let me close with this thought on the illegal immigration registration portion of H.R. 4844: A Congressional Research Service report from September of 2005 indicated that more than 25 states did not require proof of legal presence in the United States in order to apply for and obtain a driver's license. And, as a consequence of the Motor Voter law, every single person who applies for a driver's license is asked if they want to register to vote. Voter rolls in the United States, particularly in states that allow illegal immigrants to obtain driver's licenses, are inflated by non-citizens who are registered to vote. The only question is the number.

Voter Identification Requirements

I would like to briefly address the voter identification portion of H.R. 4844. H.R. 4844 appears to be a significant step forward to address the cynicism, skepticism and fraud that keep many American citizens on the sidelines and out of the voting booth. Requiring a person to identify

themselves with photo identification before casting a ballot enjoys broad public support. The American Center for Voting Rights - Legislative Fund's polling in Pennsylvania and Missouri found that more than 80% of the population favors photo ID requirement in order to vote. Other state specific polls in Wisconsin and Washington have found similar levels of public support for voter identification requirements. Nationally, a Wall Street Journal/NBC poll conducted by on April 21-26, 2006 found that more than eighty percent of U.S. citizens support the requirement that a person show a photo ID before they are allowed to cast a ballot.

When the issue of voter photo ID is placed on the ballot, there is strong nonpartisan support for the measure. Albuquerque voters, with the support of Hispanic Democrat Mayor Chavez adopted a photo ID requirement for all Albuquerque elections. In Arizona, voters passed a popular state-wide initiative (Proposition 200) that, separate and apart from providing proof of citizenship to register, required voters to present identification before voting.

Voter photo identification requirements - including photo identification requirements - have emerged as a national consensus. More than twenty-four states currently require every voter to provide identification before casting a ballot and seven states currently require photo identification in order to vote.

Election reform legislation requiring photo identification before casting a ballot has been introduced this legislative session in at least four more states and a national photo ID requirement amendment introduced by Senator McConnell was part of the Senate debate on the immigration reform bill, although it was not included in the final version of the Senate bill.

New Mexico and Albuquerque voters support photo ID by a significant percentage. Prior to 2004, the polls indicated an overall margin of 77-17% support including significant bipartisan support with sixty-six percent of Democrats supporting photo ID. (Dan McKay, "Voter picture ID has wide support." Albuquerque Journal 8/24/05). Polling showed photo ID with overwhelming support "among Republicans and Democrats, Anglos and Hispanics and across all income levels" in Albuquerque. (Id.) The Albuquerque City photo identification requirements currently in affect are the subject of the federal suit. However, the press reported broad support for the measure and the implementation of the change. Albuquerque City Clerk Judy Chavez and other election officials said the rule change did not cause any problems. ("New ID Rule Passes Test," Albuquerque Journal, 11/16/05.) Shirley Bartel, an election clerk at Chelwood Elementary School, said many voters had their IDs out already when approaching the polls. "They said, 'It should have been done a long time ago. It makes for a more honest election,' Bartel said." ("New ID Rule Passes Test," Albuquerque Journal, 11/16/05). "Herbert Gutierrez, a retiree who voted Tuesday, said producing an ID was no problem. 'I wish they would make it mandatory for everything,' he said." (Id.)

In connection with the 2004 New Mexico Voter ID lawsuits, a poll that was conducted established that first time voters, those people who had registered, but not in person before a clerk, were more concerned about fraudulent voting and fraudulent registrations than people who have been voting for years. I submit to you that any steps Congress might take to ensure and assure voters and potential voters that only citizens and registered voters are allowed to vote is important, not just for the integrity of the vote itself, but for the increasing numbers of voters who are skeptical or cynical about the honesty and fairness of our elections.

As it often happens, John Trever, an award winning political cartoonist from my hometown paper, The Albuquerque Journal, captured the sentiments of most New Mexicans in the days before and shortly after the 2004 election. Attachment 8.

Conclusion

As to need for effective identification requirements before voting, it is impossible to come to any conclusion other than the obvious. If the 2008 Presidential Election in New Mexico matters, if the count is close, I absolutely guarantee this Committee that without effective voter identification requirements, real limitations and real safeguards to prevent fraud and ineligible persons from voting, then any New Mexico result certainly will be subject to challenge for fraud and ineligible persons voting. My preliminary view of HR 4844 is that it is a significant and important step forward in the effort to restore and honor the right to vote. Increased confidence in the system that our elections are fair and honest will increase participation.

I would be happy to take questions from the Committee.